some of the key benefits that local communities seek from advanced telecommunications systems. Such benefits include continued development of a vigorous local economy, expansion of the information infrastructure, and innovative new services to members of the community.

To be sure, Coalition members recognize that local franchising authorities have been characterized in some quarters as being obstacles to competition and as favoring monopoly provision of cable service. And it is certainly true that there is precious little head-to-head competition in the cable industry. But the cause is neither local franchising nor local franchising authorities. The common experience of franchise authorities nationwide is that almost no one has ever even asked for a franchise to compete with the incumbent cable operator, notwithstanding the fact that virtually all cable franchises nationwide are nonexclusive by their terms.

Instead, local franchising authorities' efforts to encourage competition have been met almost uniformly with vigorous opposition, either from the incumbent cable operator or from the few new entrants, who generally wish to participate in a local cable market only if allowed to do so on terms preferential to those of the incumbent, or if there is a real prospect of "greenmailing" the incumbent. Thus, for example, efforts to introduce competition are invariably met with litigation from the incumbent cable operator, whether the competition is in the form of a municipal cable system[6] or in the form of a private overbuild cable operator.[7] Similarly, franchising authorities have been met with legal challenges when they attempted to preserve competition by disapproving a franchise transfer that would have eliminated competition by merging two competing cable franchisees.[8] Moreover, even in the rare cases where an overbuilder actually has come forward to compete, this competition has often proved transitory. Thus, for example, in Florida, over thirty communities issued competitive franchises to a well-financed overbuilder, but the overbuilder is now exiting the market.[9]

On the other hand, franchising authorities' efforts to require prospective overbuilders to compete subject to the same franchising requirements as their incumbent competition have met with equally vigorous opposition from the would-be overbuilder.

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[6]See, e.g., City of Jamestown v. James Cable Partners, L.P.. 43 F.3d 277 (6th Cir. 1995) (incumbent cable operators sues city for trying to introduce competition with municipal cable system); Warner Cable Communications, Inc. v. City of Niceville, 911 F.2d 634 (11th Cir. 1990), cert. denied, 111 S.Ct. 2839 (1991) (same); Paragould Cablevision v. City of Paragould, 930 F.2d 1310 (8th Cir.), cert. denied, 112 S.Ct. 430 (1991) (same).

[7]See, e.g., Triad CATV, Inc. v. City of Hastings, 916 F.2d 713, text at 1990 WL 155312 (6th Cir. 1990) (incumbent cable operator sues franchising authority for granting overbuild franchise); Storer Communications v. Boone County Fiscal Court, No. 89-183, slip. op. (E.D. Ky. Apr. 24, 1992) (same).

[8]See, e.g., Cable Alabama Corp. v. City of Huntsville, 768 F.Supp. 1484 (N.D. Ala. 1991). Fortunately, the Cable Alabama decision was effectively overruled by a provision of the 1992 Cable Act, 47 U.S.C. § 533(d)(1) and (2).

[9]See, e.g., Warren's Cable Regulation Monitor, March 6, 1995 at 7.

The Preferred case, which is often cited as an example of municipal opposition to competition, actually illustrates this problem.[10] The plaintiff in Preferred claimed a desire to compete, but wished to sidestep the franchising process entirely and receive treatment preferential to incumbent cable operators.

Thus, in the rare instances where the possibility of competition has emerged, franchising authorities have found themselves repeatedly thwarted, either by the incumbent operator seeking to protect its monopoly, or by the supposed competitor insisting on preferential treatment.

Because LECs are generally well-financed and already have some infrastructure in place, LEC entry holds the potential for genuine competition in the cable market. Coalition members certainly hope so. They welcome competition in the video market from telephone companies. For example, when Bell Atlantic proposed to seek a cable franchise from the City of Alexandria, the City was legally unable at that time to grant such a franchise, due to the telephone-cable cross-ownership prohibition. However, encouraged by the prospect of active competition, the City provided Bell Atlantic with a letter regarding the City's interest in granting a franchise to Bell

[10]See Preferred Communications, Inc. v. City of Los Angeles, 13 F.3d 1327 (9th Cir.), cert. denied, 114 S.Ct. 2738 (1994) (requiring City to issue a notice of sale for a second competitive franchise in the area, but also upholding the City's notice of sale process to award franchises, over Preferred's objection).

Atlantic, a letter that was referred to by the court in deciding standing issues presented by the case.[11]

But even here, once again, the would-be competitor sought a regulatory advantage rather than offering to compete on even terms. Bell Atlantic subsequently reneged on its stated intention to seek a cable franchise from the City of Alexandria and refused to apply for such a franchise, even when invited to do so by the City. Instead, Bell Atlantic has since argued that under the Commission's rules it can construct a video dialtone system in Alexandria and provide video programming directly to subscribers over that system through its wholly-owned subsidiary, Bell Atlantic Video Services Company ("BVS"), without obtaining a Cable Act franchise. The Commission, perhaps inadvertently, abetted this attempt by Bell Atlantic to evade its Cable Act obligations when it refused to expressly require Bell Atlantic to obtain such a franchise in its recent authorization of a market trial in Northern Virginia.[12]

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[11]See C&P, 830 F. Supp. at 911. (Affidavit of Patricia S. Ticer).

[12]See In re Application of the Chesapeake and Potomac Telephone Company of Virginia for Authority pursuant to Section 214 of the Communications Act of 1934, as amended, to construct, operate, own, and maintain facilities to test a new technology for use in providing video dialtone within a geographically defined trial area in northern Virginia, W-P-C 6834, Order and Authorization at ¶¶ 21-24 (Jan. 20, 1995) ("Bell Atlantic Authorization").

B. Allowing Video Dialtone Operators to Use the Rights-of-Way on Different Terms from Traditional Cable Operators Would Distort, Not Enhance, Competition.

The Commission has stated that one of its primary goals in sanctioning video dialtone is to promote competition -- in particular, to promote competition with traditional cable operators, who have historically faced little or no effective competition.[13] As indicated above, the Coalition strongly supports the goal of competition. Indeed, like most local franchising authorities, Coalition members would welcome head-to-head competition between competing multichannel video providers and the benefits it would bring their residents.

Competition would not be served, however, by allowing a self-programming video dialtone provider to enter and compete against an incumbent cable operator without requiring the video dialtone provider to be subject to the same franchising process as its competitor. To the contrary, immunizing self-programming video dialtone providers from Cable Act requirements would create an unlevel playing field, which would be anathema to genuine

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[13] See, e.g., First Report and Order at ¶¶ 8, 15-16; In re Telephone Company--Cable Television Cross-Ownership Rules, Sections 63.54 - 63.58, CC Docket No. 87-266, Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, 7 FCC Rcd. 5781 at ¶¶ 6, 9, 26 (1992) ("Second Report and Order"); In re Telephone Company--Cable Television Cross-Ownership Rules, Sections 63.54 - 63.58, CC Docket No. 87-266, Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking at ¶ 3 (November 7, 1994) ("Second Reconsideration Order"), appeals pending sub nom. Mankato Citizens Telephone Company v. FCC, No. 92-1404 (D.C. Cir. filed Sept. 9, 1992, appeals of Second Reconsideration Order consolidated with appeals of Second Report and Order or such consolidation pending).

competition. Such an action would create market distortion and would be tantamount to a Commission-imposed subsidy of video dialtone operators, at local communities' expense, giving the telephone companies a competitive advantage over their competitors, incumbent cable operators.

Competition is not served if competitors are subject to different, and inconsistent, regulatory regimes.[14] While regulatory barriers to entry should be removed wherever possible, every technology should pay its own way and be required to absorb the real costs it imposes. Requiring video dialtone providers to pay fair market value for their use of local rights-of-way just as their cable operator competitors do is not a "barrier to entry." It is sound application of fundamental economic principles: every user of a scarce resource should pay a reasonable price for the allocation of the resource to the user's benefit. Allowing any competitor to gain preferential advantage through government fiat would create a market-distorting subsidy. Moreover, it would deprive local communities of their property

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[14]This point has been recognized in another context by video dialtone applicants themselves: "At a minimum, the Commission should require competitors providing the same products to be governed by the same rules." In re Application of Pacific Bell For authority pursuant to Section 214 of the Communications Act of 1934, and Section 63.01 of the Commission's Rules and Regulations to construct and maintain advanced telecommunications facilities to provide video dialtone services to selected communities in the Los Angeles, California area Application at 7 (filed Dec. 20, 1993).

rights to receive fair compensation for a mandated government taking.[15]

The Commission clearly expects self-programming video dialtone operators to compete with traditional cable operators. Yet if self-programming video dialtone operators are exempted from the Cable Act, they will be placed on a different regulatory playing field from that on which their competitors, the traditional cable operators, function. Thus, if the goal is competition, the FCC should make self-programming video dialtone operators subject to the same regulatory regime as their competitors: the Cable Act.

The situation in Alexandria provides an example of how the development of real competition on even terms has been encouraged by the local franchising authorities, but impeded by the LECs' efforts to engage in regulatory gamesmanship -- efforts perhaps inadvertently aided by Commission suggestions that video dialtone may be a vehicle for LECs to provide cable service without a cable franchise.

C. The Commission Should Not Compel LECs To Enter the Market Through Video Dialtone As Opposed to Becoming Cable Operators.

The Coalition believes it would be unwise for the Commission to try to compel LECs to become video dialtone providers rather than cable operators.[16] While the Coalition sympathizes with the

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[15] See, e.g., City of St. Louis v. Western Union Telegraph Co., 148 U.S. 92 (1893).

[16] See Fourth FNPRM at ¶ 13.

Commission's apparent goal -- to try to make LEC wireline video providers behave in a way that perhaps cable operators should have been made to behave -- that goal ignores economic reality. There is no guarantee that pure video dialtone, without self-programming, will succeed in competing against traditional cable. The vigor with which the telephone industry challenged the cross-ownership prohibition, as well as the various devices proposed by LECs in their video dialtone Section 214 applications (such as anchor programmers and "will-carry"), shows that LECs believe that, to compete with cable operators, they cannot merely be passive conduit lessors but must instead be able to package programming that subscribers want to see.[17] In other words, to compete effectively with a cable operator, a LEC will in all likelihood have to be a cable operator.

As a result, trying to force LECs to enter as video dialtone operators rather than cable operators would merely invite endless contentious proceedings before the Commission and the courts, as LECs tried to create devices to allow them to compete with cable operators while avoiding the obligations of Title VI. Rather than trying to craft a new, non-statutory regime of regulation, the Commission should permit the LECs to apply for cable franchises under Title VI and content itself with determining

[17]LECs made this argument as early as their 1992 comments on the <u>First Report and Order</u>. <u>See, e.g.</u>, Comments of Southwestern Bell Corporation at 6-12 (Feb. 3, 1992) (video dialtone without programming is unlikely to support the necessary investment); Comments of Bell Atlantic at 5-10 (Feb. 3, 1992) (video dialtone alone, without provision of programming, will not deliver true competition).

what cost allocation and similar safeguards are necessary to govern LEC entry into the provision of cable service.[18]

D. Allowing LECs to Acquire Cable Systems In Their Service Areas Would Not Promote Competition.

The Commission has suggested that it might permit telephone companies to acquire existing cable systems where the local market would be unable to support competition.[19] Obviously, any such acquisition would frustrate one of the Commission's key justifications for video dialtone -- encouraging competition. Acquisitions of cable systems by LECs would actually discourage the growth of competition. The acquisitions would create a single bottleneck gatekeeper for wireline communications where two separate bottlenecks existed before. This is a consolidation of monopoly power that would make eventual competition even less likely. Even if it is argued that one monopolist in two separate markets (telephone and video) is no worse than two separate monopolists in those markets, from the standpoint of editorial diversity, a key element in the Commission's public interest analysis, the consolidation of formerly separate communications pathways is devastating.

Other problems also afflict the Commission's proposed buyout policy. First, it is not clear that there is a reliable way to determine when a market cannot support competition, particularly

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[18]See, e.g., comments of NATOA (Mar. 21, 1995).

[19]See Second Reconsideration Order at ¶¶ 48, 277-279; Fourth FNPRM at ¶ 28.

when both the parties directly involved in a potential buyout -- the cable company and the LEC -- would have strong incentives for convincing the Commission that competition was impossible. The Commission should seek ways to encourage competition in such a case, rather than ensure that the most likely potential competitor is removed by acquisition.[20] Accordingly, Coalition members have serious reservations about allowing LECs to acquire cable systems in their telephone service areas, at least in any market where there is any possibility at all (however remote) of head-to-head competition.

III. TELEPHONE COMPANIES MUST PAY FAIR COMPENSATION FOR THEIR USE OF PUBLIC RIGHTS-OF-WAY.

A. Communities Have a Right to Fair Compensation.

Video dialtone operators, like cable operators, permanently occupy the public rights-of-way by installing coaxial or fiber-optic cables and other equipment on, under, and above the streets and other public property of a community. These rights-of-way belong to the community: they are the property of the local or state government, held in trust for the common use and enjoyment of its citizens.[21] Thus, when a communications provider permanently occupies public rights-of-way to establish a new

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[20]See 15 U.S.C. § 21 (FCC responsible for enforcing compliance with section 7 of the Clayton Act where applicable to common carriers engaged in wire or radio communication or radio transmission of energy).

[21]See, e.g., City of St. Louis, 148 U.S. 92; Erie Telecommunications, Inc. v. City of Erie, 659 F. Supp. 580, 594 (W.D. Pa. 1987), aff'd, 853 F.2d 1084 (3d Cir. 1988).

broadband communications system, the community is in effect contributing a valuable resource to the enterprise, one of the key economic inputs used by wireline video distributors.[22]

As the public's agent, the local franchising authority, like any other owner of property, has a right to charge a fair price for the use of that resource and to earn a fair return.[23] Moreover, local governments incur substantial costs to acquire and maintain this property. For example, they must pay compensation when property is condemned to be incorporated into the public rights-of-way. In addition, the local government must pay to maintain, improve, and administer the roads. Local government also must absorb the impact of shortened road life and congestion caused by occupants of the rights-of-way, as discussed below.

Considering both market value and the costs of acquisition and maintenance, the public rights-of-way constitute one of the

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[22] See Nicholas P. Miller, Local Government: The Silent Investor in Wireline Telecommunications Networks, in Local Government Roles and Choices on the Information Superhighway: Tenants or Architects of the Telecommunications Future? (PTI 1994), attached as Appendix B.

[23] See, e.g., Erie Telecommunications, 659 F. Supp. at 594, (quoting Allegheny City v. Railway, 159 Pa. 411, 416-17 (1893)):

> A valuable franchise, to use public property the street, for corporate profit, is about to be granted. It is not illegal or unreasonable that the public, or the city which represents it, should have a consideration for the privilege that it confers. If it were a right of passage over private property, there would be no question about it, and the right could not be got in any other way. We see no reason why the public interest should not be promoted by requiring special privileges in the public property to be paid in the same way.

most valuable investments belonging to local governments and their taxpaying residents. The Cable Act recognizes this fact. It allows each community to negotiate either cash or in-kind compensation from the cable operator, depending on the specific needs of the locality.[24]

Local communities simply wish to receive fair compensation from self-programming video dialtone operators, comparable to the compensation that they now receive from incumbent cable operators. Paying fair compensation does not inhibit competition; rather, it puts competitors on even terms. Telephone companies, by contrast, wish to have their cake and eat it too: to provide cable service in competition with incumbent cable operators, yet cling to the Cable Act exemption the Commission created for a video dialtone operator that does not provide its own programming. It is not surprising that the telephone industry should pursue this sort of competitive advantage. What is remarkable is that the Commission has suggested that it might sympathize with this blatant bid for regulatory favors.

In suggesting that it might attempt to excuse self-programming video dialtone operators from their clear obligations under the Cable Act, the Commission appears to be considering taking local communities' property -- the public rights-of-way --

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[24] See 47 U.S.C. §§ 531, 542, 544; H.R. Rep. No. 934, 98th Cong., 2d Sess. at 26 (1984), reprinted in 1984 U.S.C.C.A.N. 4655, 4663 ("House Report") ("Each local franchising authority may assess the cable operator a fee for the operator's use of public ways").

to subsidize the Commission's abstract national vision of the information highway. Even if the Commission had the power to do so (which it does not), such a taking would reflect an unhealthy centralization of authority, and a form of enforced subsidization of video dialtone providers by local communities and their taxpaying residents. It would be the equivalent of an unfunded mandate, imposing costs on local communities and depriving them of compensation for their assets to subsidize an industry the Commission wishes to promote -- a remarkably healthy industry that is hardly in need of government subsidization.

The Commission cannot justify forcing communities to subsidize telephone companies by pointing to the importance of developing broadband networks. Individual communities, at their own discretion, may choose to forego some of their due compensation to subsidize the rapid development of broadband networks reaching all citizens in that community. But the federal government cannot appropriate every community's right to a fair rental value without engaging in a taking of the local community's property. Such a taking would require the federal government to pay fair compensation to each and every community across the nation.[25]

If the Commission were to decide to force communities to donate their rights-of-way to telephone companies, it would be as if the Commission required Intel to provide telephone or cable

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[25]See, e.g., City of St. Louis, 148 U.S. 92; California v. U.S., 395 F.2d 261, 263 (9th Cir. 1968).

companies with free microprocessors, simply because those components may be essential in building the information infrastructure. Yet no one would question Intel's right to share in proportion to that company's overall contribution to the enterprise by selling what it owns to the communications carriers at a price fair to both parties. Similarly, the very importance of the advanced networks, and the revenues they may earn, make up part of the market value and hence the fair price to be paid to the local community for the use of its public rights-of-way.

In other contexts, the Commission has fervently defended the right of a private company to a fair return on its investment.[26] Similarly, the federal government has recognized in conducting the recent spectrum auctions that it may demand fair compensation for use of a comparable public resource, the electromagnetic spectrum. The Commission cannot charge fair market value for federal spectrum and then deny local communities their right to receive fair compensation for use of their local rights-of-way. Nor can the Commission appropriate local public property that does not belong to the federal government in order to subsidize

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[26] See, e.g., Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, MM Docket 92-266, Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, 9 FCC Rcd 4119 at ¶¶ 106-109 (March 30, 1994) (full rate reductions not required of cable operators with high rates because their costs might be unusually high); Brief for Respondents at 58, Time Warner Entertainment Co., L.P., v. FCC, No. 93-1723 (D.C. Cir. filed Nov. 1, 1993) (Sept. 26, 1994) (cost-of-service option ensures that cable operators can earn a reasonable return on investment).

LECs' ability to compete in the video marketplace against the cable industry, which now pays for the public resources it uses.

B. Right-of-Way Compensation Provides Vital Public Benefits to Local Communities.

The value of the public rights-of-way to local communities is evident in the benefits they obtain through cable franchising. Through franchises under the Cable Act, cable operators and local communities freely negotiate and jointly determine what compensation to the community reflects the market value of the public property used by the operator. This compensation both facilitates public services and reduces the tax burden on citizens at large.

Cable operators' compensation for use of the rights-of-way may include both monetary and in-kind elements.[27] Thus, for example, most communities require franchise fees as a direct cash payment reflecting part of the value of the public rights-of-way used and occupied by the cable operator. The franchise fee portion of this compensation alone may be substantial: for example, the franchise fees paid for fiscal year 1994 were $12.2 million, $4,387,085, and $3,886,235 in the City of Los Angeles, Montgomery County and Baltimore County respectively. But other

[27]It should be noted that the Cable Act already places certain limits on the compensation that may be negotiated by franchising authorities. For example, those cash payments that are classified as "franchise fees" according to 47 U.S.C. § 542(g) are capped at five percent of gross revenues derived from the operation of the system. However, the Act also allows communities to obtain other kinds of compensation, such as public, educational and governmental ("PEG") access capacity and facilities. See, e.g., 47 U.S.C. § 531.

key benefits are secured by such franchises as well.[28] Appendix A presents a brief summary of some of the specific benefits secured in cable franchises of the Coalition members.

Service to Schools and Public Institutions. Most franchise agreements -- for example, in Anne Arundel, Baltimore, and Montgomery Counties, and the City of Los Angeles -- contain provisions requiring the cable operator to provide not only installation of a cable drop, but also free basic cable service, to public schools, colleges, and universities, so that they can take advantage of educational programming on basic tier channels. In Prince George's County, the cable operators are also responsible for providing internal wiring in the schools.

PEG Access. Whether video service is provided via a cable system, a pure video dialtone system, or a hybrid self-programming video dialtone system, ordinary citizens -- whose taxes pay for establishing and maintaining the public property the operator uses -- should be afforded reasonable access to speak on the system. The franchising process accomplishes this objective through PEG access requirements, including both capacity and facilities for PEG use; capital grants for equipment used to provide PEG access; training and other services that enable individual citizens, nonprofit groups, and the local government itself to create and provide programming; and cable operator-produced programming of special local interest.

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[28] See 47 U.S.C. §§ 542, 544, 531.

To make PEG access possible, carriage on the system is the first requirement. The number of channels provided for PEG use differs (depending on local needs and interests) in each community. Montgomery County, for instance, requires 13 access channels, while Baltimore County requires seven and Los Angeles requires six. However, it is also necessary to provide for the creation of the programming itself. Thus, for example, in Montgomery County, the cable operator provides 1.5 percent of its gross revenues to fund PEG access. Similarly, in Prince George's County, the two cable operators provide a total of $300,000 per year to support access. The City of Los Angeles receives approximately $2 million in support, plus equipment and facilities, for its governmental access channels alone.

These requirements serve a compelling objective: promoting a wide diversity of speakers -- the fundamental goal of the First Amendment.[29] Experience shows that requirements such as grants for access equipment, access to studio space, and coverage of community events are essential to allow citizens to make practical use of PEG channels.

Institutional Networks. Similarly, communities often negotiate in their cable franchises requirements for the construction of an institutional network or "I-Net." Such networks, which typically link municipal offices, police precincts, fire departments, schools, colleges, universities, libraries, hospitals and industry, are becoming increasingly

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[29] House Report at 30.

important to the efficient operation of local governments and schools. For example, in Anne Arundel and Montgomery Counties, the I-Net is used to conduct criminal arraignments and bond review hearings by video, thereby obviating the need to transport the arrestees from the local jail to court. Anne Arundel County estimates that this use of the I-Net results in over $100,000 in annual savings. Anne Arundel County also uses the I-Net for two-way interactive classrooms (distance learning), teleconferencing and faculty and staff training, among other things. In Montgomery County, vehicle traffic monitoring and internal telephone traffic are among the key uses of the I-Net, which has become an indispensable part of the County's infrastructure.

Coverage of Local Government and Local Events. In addition, many franchise agreements require a government access channel that is used to cablecast local government meetings, such as meetings of city councils, zoning boards and school boards. This service allows citizens to observe and monitor their local elected representatives at work, including municipal decisions regarding the imposition of taxes and other charges affecting their citizens, thereby increasing citizens' ability to participate in the local government's political process and hold it accountable.[30] In Baltimore County, Maryland, for example,

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[30] Cf. Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, MM Docket 92-266, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631 at ¶ 545 (May 3, 1993) (franchise fee itemization on subscriber bills serves purpose of increasing political accountability for regulatory decisions).

the cable operator provides coverage of County Council meetings and other local origination programming without charge. In Montgomery County, Maryland, the cable operator provided 87,398 hours of local origination programming in 1994. Similarly, in Anne Arundel County, Maryland, the four cable systems there supply an average of 103 hours of local origination programming per month.

Even aside from local cable franchising, the value of the public rights-of-way to communications carriers is evident in other cases where negotiations are currently taking place to establish a price. For example, the State of Maryland recently concluded an agreement with MCI and Teleport Communications Group, under which the two companies will be allowed to build broadband links in approximately seventy miles of state-owned rights-of-way.[31] The benefits to the State -- its compensation for the companies' use of state-owned rights-of-way -- included access to the new broadband system for the term of the agreement, together with transmission equipment and design assistance in support of the State's Intelligent Vehicle Highway System. The State values these benefits at nearly $33 million.[32]

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[31]See State of Maryland Contract No. AST-9443-FOBW, dated August 24, 1994, by and between the State of Maryland, acting by and through the Department of General Services ("DGS") and MCI Telecommunications Corporation ("MCI"), as amended by Modification No. 1, dated December 9, 1994, by and between DGS, MCI, and TCG America, Inc.

[32]See State of Maryland Department of General Services, Action Agenda, Contract Modification (Telecommunications Service Contract), Item No. 8-S-MOD (2d Revision) (Nov. 30, 1994) (estimating value to the State at $32,545,962).

C. Telephone Companies' Authorization to Provide Local Telephone Service Does Not Entitle Them to Use the Rights-of-Way for Video Service.

LECs have argued that, since they already make use of local rights-of-way to provide local telephone service, no additional compensation or authority is required under Title VI for them to build and operate video dialtone systems. But that argument rests on a fundamental misunderstanding of the scope of the grants LECs have received under both federal and state law. On their face, Titles II and VI of the Communications Act draw a sharp distinction between common carrier wire telephony (Title II) and operator-selected delivery of multichannel video programming by wire (Title VI). Authority to provide one is not authority to provide the other. The explicit references in Title VI (e.g., 47 U.S.C. §§ 522(7)(C) and 541(c) and (a)) to possible hybrid common carrier/cable systems underscore this conclusion.

State laws, while more varied in nature, draw the same distinction. Typically, state law provides that local telephone service is regulated by the state public utilities commission, while cable systems are regulated by local governments through the franchise process.[33] In some states, like Virginia, LECs are required to obtain a local franchise even for local telephone service. In other states, like California, they are not. In

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[33]See, e.g., Ann. Code of Md., Art. 78, §§ 1 and 2, and Art. 23A, § 2(b)(13); Code of Va. §§ 12.1-12, 15.1-23.1 and 56-1; Cal. Pub. Util. Code §§ 216 and 701, and Cal. Gov't Code § 53066; Fl. St. §§ 364.01, 166.021 and 166.046; and Ind. Code §§ 8-1-2-1, 36-1-3 and 36-3.

virtually all states, however, a franchise from the local government is required to provide cable service.[34]

In arguing to the contrary, LECs are simply ignoring the scope of their current grants to use local rights-of-way: to provide common carrier telephone service. To allow LECs to unilaterally expand the scope of these grants far beyond their original intent would be a taking, requiring compensation to the local government property owner, because it would greatly enhance the value of the grant without obligating the LEC to compensate the local government for the additional value taken from the community and conferred on the LEC. It would be analogous to claiming that a lease allowing a company to drill for oil on a property must automatically entitle the company to mine gold as well, without any additional compensation to the landowner.

D. Payment of Comparable Compensation Promotes Fair Competition.

The enormous growth and success of cable operators over the past twenty years proves that paying fair compensation for use of local rights-of-way in no way inhibits the rapid development of local broadband networks. Despite what operators often caricature as the crushing burden of franchise requirements, the cable industry has succeeded in developing an immensely profitable business while still being able to provide, through

[34]The only exceptions of which we are aware are the handful of states that regulate cable at the state level. Even in those states, however, a separate franchise is required to provide cable service.

the franchise process, valuable services to the public in return for their use of public rights-of-way. Surely telephone companies, operating their new video networks under comparable conditions, will be able to achieve similar success while likewise paying fair compensation for the public property they use.

Local communities are not only willing, but eager, to negotiate compensation agreements that will be fair and beneficial to all parties. It is the telephone companies that seek to avoid or stall such negotiations until they can manipulate the law to prevent the communities from negotiating at all. The Commission should be under no illusions about what LECs seek in arguing that a self-programming video dialtone system should be immune from Title VI: They are asking the Commission to allow them to have a regulatory leg up on their competitors. The difference is crucial. Communities want to make a fair deal and to have a level playing field; the telephone companies want to exploit local public property for free, and to have a playing field tilted to their advantage.

Allowing LECs to exercise any editorial control over video dialtone systems without a Cable Act franchise would be tantamount to granting them a Commission-imposed subsidy, at the expense of the already-tight budgets of local governments and their taxpaying residents. If the Commission wishes to grant the telephone industry such a subsidy, it should do so directly out of the federal budget, not by appropriating local public property belonging to local communities and their residents.[35]

IV. ONLY LOCAL COMMUNITIES CAN PROTECT AND ADVANCE LOCAL NEEDS AND INTERESTS.

A. The Public Interest Requires Local Community Involvement.

To a remarkable degree, opponents of local involvement in telecommunications have succeeded in establishing a widespread, but erroneous, impression that local franchising is a mere anachronism, an outmoded regime of unnecessary regulation that would be irrelevant in the streamlined, high-tech world of the information highway.

Nothing could be further from the truth. The public interest requires local involvement in the development of advanced communications systems. Local governments have precisely the same responsibilities as the Commission, on a different, but equally essential, level. They do not represent the narrow private interests of any particular industry, as with the telephone or cable lobbies. Rather, local governments represent the public interest of each of their communities as a whole, including both businesses and private individuals who live and work in the community. Local governments are thus the sole guardians of local needs and interests that are otherwise likely

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[35] Cf. Second Report and Order at ¶ 44 ("The Commission believes that if any group, such as public television, needs funds for video dialtone access, it is preferable for Congress or state legislatures to provide such monies directly through targeted appropriations").

to be ignored by national organizations such as the Commission, the regional Bell holding companies, and the cable multiple system operators.

Local needs and interests vary not only from place to place, but also over time. Thus, under the Cable Act, each community may negotiate independently with cable operators, and may renegotiate at the end of the franchise term to take account of changes in local needs and interests. See 47 U.S.C. § 546(c)(1)(D). Moreover, under the Cable Act, each cable operator's performance during the franchise term is measured against local community needs as well, 47 U.S.C. § 546(c)(1)(B), placing on the operator an ongoing obligation to respond to changing needs during the franchise term.

Local governments are immediately accountable to local citizens if they fail to serve their citizens' needs: those same citizens can and will vote locally elected officials out of office. The Commission, on the other hand, has no direct connection with or accountability to local citizens. If the Commission were to attempt to usurp the role of local authorities by dictating the terms and conditions under which private businesses may use each community's rights-of-way, it would be engaging in centralized economic regulation of local property interests, an approach that is at odds with history and experience.

No higher-level organization such as the Commission should take over work that a lower-level organization closer to the people can do effectively. Federal- and state-level approaches may be appropriate in (for example) regulating rates for telephone service and setting technical and interconnection standards, but they cannot take the place of local approaches for all purposes. Only a partnership among the Commission, states, local governments, and private industry can achieve all the goals the public interest sets for the next generation of telecommunications systems.[36]

Thus, the Commission should not treat local governments as merely another private party whose special pleadings are to be balanced against the favors sought by the telephone and cable industries. The Commission's business is not to regulate local governments, but to defer to the proper boundaries of the concurrent jurisdiction in our federal form of government. Both those governments and the Commission implement the public interest at different levels. The fruits of this cooperative enterprise are apparent in the accomplishments of local franchising under the Cable Act.

B. Local Franchising is the Only Proven Method to Ensure That the Information Highway Reaches Schools and Public Institutions.

Local franchising is already building the information infrastructure the Commission wishes to foster, in ways

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[36]Cf. Chairman Reed Hundt, Address at the "Town Meeting" on Telecommunications Reform and Cities' Annual Congressional City Conference, National League of Cities (Mar. 14, 1995) ("NLC Address") ("a partnership to make this vision of an information community, sparked by competition and innovation, a reality for every one of our citizens").